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CDR Rules Expansion Amendments Consultation Paper

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission's ('ACCC') *CDR Rules Expansion Amendments Consultation Paper* ('Consultation Paper').

The Energy Council is the industry body representing 21 electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. These businesses collectively generate the overwhelming majority of electricity in Australia, sell gas and electricity to over ten million homes and businesses, and are major investors in renewable energy generation.

The AEC has concerns with the policy direction of the amendments proposed in this Consultation Paper. They represent a substantial change to the Consumer Data Right ('CDR') regime and should not be progressed without clear evidence of the costs and benefits of these reforms at this time. The proposed amendments should only be considered after an assessment of how the original rules are working, the customer experience to date, and any privacy or security risks that may arise. In the energy sector, the timing of this 'version 2' rules iteration is particularly challenging given the CDR has not yet been implemented.

The CDR rules framework is intended to be economy-wide, albeit with sector-specific schedules providing targeted additional obligations where necessary. As the peak representative body for the energy sector, it is concerning that the Consultation Paper does not provide any consideration of the impacts of an expanded framework on the energy sector, despite it being next in line for implementation. Furthermore, these expansion amendments appear to have consequential implications for the CDR energy rules framework, which is still the subject of consultation. The AEC believes a clear roadmap should be developed so stakeholders, many of which are prospective CDR participants, can understand the direction of these changes.

In addition to the above policy concerns, the proposed amendments will add a layer of complexity to the CDR regime that customers do not appear ready to navigate. With customers, as well as data holders and accredited data recipients ('ADRs'), still developing familiarity with the rules framework and protections and obligations within it, introducing a sub-set of different requirements risks creating confusion. This may result in third parties unintentionally not complying with their legislative obligations as well as customers not understanding what protections they have and when they apply. While a Privacy Impact Assessment ('PIA') has been undertaken, the various risks it highlighted do not appear to have been addressed in this Consultation Paper.

Notwithstanding these policy concerns, the AEC acknowledges the shift in policy direction and has provided some targeted comments on the proposed amendments. Our positions have been guided by the findings of the PIA.

Broader policy concerns

Benefits of incremental reform

It remains unclear what the impetus for these proposed amendments are. The Consultation Paper only states these amendments have been brought about to ‘encourage the growth and functionality of the CDR’.¹ While it is important that the CDR continues to grow, it has only been three months since its initial commencement. Major amendments like those contained in the Consultation Paper should be based on an assessment of whether the original set of rules are enabling a positive customer experience and effectively maintaining customer privacy as they set out to do. It is still too early to make such an assessment.

For the energy sector, the significance of these proposed amendments is made greater by the fact that consultation on the CDR energy rules framework is still ongoing (i.e. the ACCC is still in the process of reading through submissions received and determining the draft framework). This energy framework was expected to cover some issues, such as tiered accreditation, which have now appeared to change policy course under these new amendments. It is not clear what this all ultimately means for the energy rules framework.

Compressed timeframes

The concerns above are heightened by the seemingly rushed implementation of these expansion amendments. A four-week consultation period is challenging given how complex and significant the proposed amendments are. Furthermore, the ACCC’s stated intent to amend the rules in December 2020 provides little room for proper engagement with any of the issues raised following the formal consultation process.²

The AEC believes a clear roadmap to implementation should accompany these amendments (as well as future substantive amendments). The roadmap should explain next steps once the rules are amended so CDR participants have guidance about what their obligations are and when they need to be fulfilled.

Development of general rules should give regard to other sectors

While the CDR is currently only active in the banking sector, the energy sector is working hard to understand its obligations and develop processes and procedures ready for a commencement date in the coming years, with telecommunications understood to follow soon after. A recent Senate Committee interim report recommended that the CDR be expanded to the superannuation sector too.³ These expansion amendments will apply to all such sectors, yet it can be difficult to engage with the Consultation Paper when concepts are presented as relevant to only banking. For example, table 1 – which provides a ‘preliminary assessment of risks associated with data sets’ – is specific to banking data sets.⁴ The Consultation Paper then asks the stakeholder to provide their views on the classification of risk in this table.⁵ From the perspective of an energy industry body, it is not clear if we are supposed to comment on the accuracy of the classification of risk for the banking data sets (which we do not have the technical knowledge to do) or suggest how these classifications might apply to energy data sets (if we were to do this, we would first require guidance from the ACCC as to what information they are interested in). This is a problem because it does not appear that the ACCC is

¹ ACCC, ‘CDR Rules Expansion Amendments Consultation Paper’, Australian Government, September 2020, p4.

² Ibid.

³ The Senate, ‘Select Committee on Financial Technology and Regulatory Technology’, Commonwealth of Australia, Interim Report, September 2020, p221.

⁴ ACCC, ‘CDR Rules Expansion Amendments Consultation Paper’, Australian Government, September 2020, p12.

⁵ Id at p13.

intending to undertake later consultation on how these rules will apply to other sectors, such as energy.

There are various practical reasons why the impact of these rules needs to be considered beyond only banking. For the energy industry, the very nature of the CDR ecosystem is different due to the role of the Australian Energy Market Operator ('AEMO') as a gateway. This means there is not a direct exchange of data between data holders and ADRs like there is in banking. The ACCC should also consider to what extent data holders in other sectors can absorb the regulatory and compliance costs associated with building, testing and maintaining a CDR ecosystem. The capacity and sophistication of each sector is not equal and it should not be presumed the banking experience can be replicated by all other sectors.

Customer comprehension of proposed amendments

The PIA goes into considerable detail about the 'complexity of the proposed amendments' and the risks that this poses to a flourishing CDR ecosystem.⁶ These risks mainly revolve around data holders and ADRs not understanding their legislative obligations, which increases the likelihood of mishandling customer data (as well as not having the awareness to identify when data has been mishandled); and customers not being properly informed about what they are consenting to and when a privacy breach has occurred or is at risk of occurring.⁷ The AEC found it difficult to understand the operation of some of the proposed amendments and what it meant for the obligations of data holders.

These comprehension difficulties are likely to be even greater for ordinary customers attempting to participate in the CDR regime for the first time. With the rollout of tiered accreditation, customers can no longer assume that there are uniform rules for all CDR transactions and will need to understand the different rights, responsibilities and data access levels of the third party they are engaging with. The PIA cautions this might result in customers experiencing 'information overload', which can impede their ability to provide properly informed consent.⁸ Furthermore, the proposed disclosure of CDR data to non-accredited persons means these persons will operate outside the CDR regime and therefore not be bound by its rules. The Consultation Paper notes this mainly in the context of non-accredited parties having no obligation to delete data.⁹ It is not clear how a customer, especially one engaging for the first time, is expected to understand these regulatory nuances.

With this in mind, we note that prior to the release of this Consultation Paper, a Senate Committee heard concerns from data holders and ADRs that there was already low consumer awareness about the CDR and that targeted educational campaigns were vital if customers were to realise the CDR's full potential.¹⁰ These consumer education efforts are even more vital now. While industry will play its role in improving customer awareness about the CDR, the CDR is a government policy and therefore the primary responsibility to educate should rest on the shoulders of government and government-funded institutions like the ACCC. The AEC remains concerned that the growing complexity of the CDR regime, combined with low customer awareness, could deter customers from participating or lead to a less than optimal customer experience for those that do participate.

⁶ Maddocks, 'Consumer Data Right Regime: Update 2 to Privacy Impact Assessment', 29 September 2020, p44.

⁷ Id at p44-45.

⁸ Id at p47.

⁹ ACCC, 'CDR Rules Expansion Amendments Consultation Paper', Australian Government, September 2020, p29.

¹⁰ The Senate, 'Select Committee on Financial Technology and Regulatory Technology', Commonwealth of Australia, Interim Report, September 2020, p219.

Response to the proposed expansion amendments

3. Tiered/restricted accreditation

The AEC has recommended in previous submissions that tiered accreditation not be pursued until confidence in the privacy and security protections of the CDR has developed. We acknowledge that this does not appear to be the position of the Federal Government or ACCC, and that tiered accreditation will be introduced early on into the CDR regime. Noting this preferred policy position, it is critical that tiered accreditation does not undermine core customer protections in the CDR framework. We remain concerned that tiered accreditation is less about improving the customer experience and more an effort, as the Consultation Paper states, to ‘reduce compliance costs for service providers’.¹¹ The PIA has similarly raised repeated concern that the proposed introduction of tiered accreditation risks hindering, rather than enhancing, the customer experience because it invites ‘less sophisticated entities’ to handle important personal information without fully understanding the privacy obligations they hold.¹²

Before considering the three types of restricted accreditation proposed in the Consultation Paper, the AEC wishes to reiterate its position that a pre-requisite to any tiered accreditation in energy must be the Federal Government actioning recommendation 34 from the ACCC’s *Retail Electricity Pricing Inquiry* report, which is to develop and enforce a mandatory code of conduct on third party intermediaries that includes an obligation to act in the best interests of the customer.¹³ The problems identified with the current commission-based model of most third parties have not been addressed, as highlighted by the ACCC’s recent enforcement activity.¹⁴ There is a real risk this type of behaviour could be exacerbated under the CDR unless proper protections are in place.

3.1 Limited Data Restriction

The AEC does not support limited data restriction as proposed in the Consultation Paper. Notwithstanding the aforementioned problem with being asked to assess the sensitivity of banking data sets, we believe that any assessment must consider the cumulative risk to privacy when data sets are combined with other information.

3.2 Data Enclave Restriction

The AEC tentatively supports data enclave restriction, although would like to see evidence of compelling use cases before it is rolled out. We are also cautious about how the ACCC will ensure that the “principal” does not maintain access to the data through screen scraping or other forms of digital recording.

3.3 Affiliate Restriction

The AEC does not support affiliate restriction as proposed in the Consultation Paper. As a matter of principle, the ACCC should not abdicate its responsibilities as the registrar for accreditation under the CDR. This principle should be upheld to ensure best regulatory practice (the ACCC is best positioned to determine whether a third party meets the necessary criteria to participate in the CDR), but also so customers have the confidence to participate in the CDR regime (a customer is more likely to trust a third party that the ACCC has accredited).

¹¹ ACCC, ‘CDR Rules Expansion Amendments Consultation Paper’, Australian Government, September 2020, p4.

¹² Maddocks, ‘Consumer Data Right Regime: Update 2 to Privacy Impact Assessment’, 29 September 2020, p45, 69.

¹³ ACCC, ‘Retail Electricity Pricing Inquiry – Final Report’, Commonwealth of Australia, June 2018, Chapter 14.

¹⁴ ACCC, ‘iSelect to pay \$8.5 million for misleading consumers comparing energy plans’, 8 October 2020, <https://www.accc.gov.au/media-release/iselect-to-pay-85-million-for-misleading-consumers-comparing-energy-plans>.

Notwithstanding the above, the AEC does not believe there is a compelling use case for affiliate restriction level accreditation to be introduced at this stage of the CDR's development. Evidence of compelling use cases should be presented first, given that affiliate restriction level accreditation will add another layer of regulatory complexity to the CDR. For the ACCC, it will mean developing a targeted audit program to ensure affiliate third parties are compliant. This is problematic because this audit program, at least as described in the Consultation Paper, appears to be "after the fact" meaning it will not prevent non-compliant behaviour from occurring; it simply identifies that it has occurred. While the ACCC does intend to incentivise the sponsor to ensure the affiliate is compliant, it is not entirely clear what these incentives are and whether the sponsor even has the ability to appropriately monitor compliance.¹⁵ For the customer, the addition of affiliate restriction is likely to create further confusion and the ACCC should consider how customers should be expected to understand when they are engaging with an affiliate entity and what this means for their data.

The AEC believes there are alternative mechanisms that have the ability to deliver the customer benefits of the proposed affiliate restriction, with fewer risks. Specifically, tiered accreditation could be implemented through changes to the combined accredited person ('CAP') arrangements. These arrangements could be designed to enable affiliated businesses to come together and offer CDR services under an "umbrella" authorisation. Practically, this would ensure that smaller entities would have access to data streams under the CDR, without in any way decreasing the protections and security available to consumers. It would be important to ensure that any rules developed by the ACCC would have the capacity to hold the registered ADR liable for the conduct of its affiliate.

5. Expansion to non-accredited persons

The AEC agrees with the ACCC's summation that allowing disclosure to non-accredited persons represents a 'significant shift in the CDR regime'.¹⁶ Consistent with our concerns raised elsewhere, we are wary that these amendments could create a regime too complex for customers to understand, which may lead to unintended consequences if customers are not aware of what they are consenting to. This is especially problematic when their data is shared outside the CDR regime.

5.1 Disclosure to trusted advisors

As the Consultation Paper states, this amendment would, for the first time, allow CDR data to be transferred to a party outside the CDR regime. While the AEC acknowledges that this amendment would provide customers with an added layer of choice, this layer of choice is dependent on the ADR. Customers can only provide their data to a trusted advisor if the ADR 'wishes to offer this functionality to consumers'.¹⁷ The likelihood of the ADR and trusted advisor sharing a commercial arrangement means the involvement of a party outside the CDR regime may not truly reflect customer choice, but rather other incentives between the ADR and trusted advisor.

The ACCC should also consider what this would mean overall for accreditation. Accreditation is the licence a party needs if they want to access CDR data. It serves as the cornerstone of the CDR and the strict requirements participants must meet to be accredited are in place to ensure customers are properly protected. Allowing non-accredited parties, even if they hold other fiduciary duties, means the customer loses their CDR protections. A trusted advisor could not receive CDR accreditation by simply proving they hold other fiduciary duties, so it should not be treated as a valid substitute.

The AEC would not oppose allowing disclosure to trusted advisors so long as the advisor is required to comply with the CDR rules. We would encourage the ACCC to consider arrangements to this effect, such as through the alternative affiliate accreditation model recommended earlier.

¹⁵ Maddocks, 'Consumer Data Right Regime: Update 2 to Privacy Impact Assessment', 29 September 2020, p73.

¹⁶ ACCC, 'CDR Rules Expansion Amendments Consultation Paper', Australian Government, September 2020, p29.

¹⁷ Ibid.

Final comments

As the energy sector is at a different stage of CDR implementation, the AEC is not able to provide substantive comments on the other amendments proposed in the Consultation Paper. The level of granularity of some of these amendments make them difficult to understand, let alone envisage how they will work in the energy sector. While we acknowledge that there are difficulties in amending an economy-wide set of rules when each sector is at a different stage of development, these difficulties are better managed through phased, incremental changes based on assessments of how the current rules are operating.

We encourage the ACCC to continue working closely with each sector to understand the opportunities and challenges they are experiencing through their engagement with the CDR to date. The AEC would welcome additional and targeted consultation on some of the key issues raised, as well as clarification as to what this consultation means for the development of the CDR energy rules framework.

Any questions about this submission should be addressed to Rhys Thomas, by email to Rhys.Thomas@energycouncil.com.au or by telephone on (03) 9205 3111.

Yours sincerely,



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